Supreme Court, U.S.
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No. 01-736

IN THE

Supreme Court of the United States

JEFFERY D. WATKINS,

Petitioner,

v.

ROADWAY EXPRESS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Roadway Express, Inc. is a wholly owned subsidiary of Roadway Corporation which is publicly traded.

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REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is whether Jeffrey D. Watkins ("Watkins" or "Petitioner") is disabled under the Americans with Disabilities Act ("ADA"). As the Fifth Circuit correctly held, the evidence at trial established that Watkins is not substantially limited in any major life activity and therefore is not entitled to the protections of the ADA. Watkins ignores the case specific, fact intensive analysis for determining disabled status under the ADA, and his reliance on the case law cited in his Petition is misplaced. There is no conflict between the Fifth Circuit's decision in this case and the precedent cited by Watkins because, unlike the plaintiffs in those cases, Watkins failed to present evidence of any major life activity in which he was substantially limited.

Moreover, Watkins' Petition and his characterization of the issues and evidence distorts the record on appeal. The Fifth Circuit granted judgment in Roadway's favor because Watkins failed to show that he was disabled under the ADA. This case was not tried as a "regarded as" disabled or a "record of" disability case. In addition, some of the factual assertions in Watkins' Petition were not in the record on appeal.

Finally, the determination of when a person is disabled under the ADA is by no means an unsettled area of law. To the contrary, Watkins complains about the law's application to him based on the evidence presented at trial. Thus, this case presents no issue of national importance and no unresolved issue of law. Accordingly, because the evidence at trial established as a matter of law that Watkins is not disabled, the Fifth Circuit's ruling was proper in all respects and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

I.

THE RECORD REGARDING WATKINS' LIMITATIONS

The determination of whether a person is substantially limited in a major life activity so as to qualify for protection under the ADA requires a case specific, fact intensive analysis. *Sutton v. United Airlines, Inc.*, 528 U.S. 471, 562 (1999). Neither the classification of an impairment nor the treatments associated therewith are determinative. Rather, an ADA plaintiff's burden is to identify a major life activity in which he is substantially limited.

In this case, the evidence established that:

- Watkins, through his physical demonstration in the court room, was able to lift two barbells weighing 80 pounds over his head without difficulty.

- Watkins could perform all of the jobs on Roadway's dock including, as alleged in Watkins' Petition, the forklift driver job, the switcher job, the dock worker job, and the "drop and hook" job.

- Watkins could move, adjust and manipulate, without assistance, freight weighing 50 pounds or more.

- Watkins could always carry on the day-to-day routines of living and plays golf recreationally.

The best Watkins could do at trial was to testify that he can no longer perform maintenance on his vehicles, cannot play basketball or softball, has some problems sleeping and

was "restricted somewhat as to what type of relationship [he can] have with [his] wife." Such testimony does not, as a matter of law, establish a substantial limitation in a major life activity. *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 642 (2d Cir. 1998) (participation in sports activities not a major life activity); *Coker v. Tampa Authority*, 962 F. Supp. 1462, 1465 (N.D. Fla. 1997) (plaintiff who was unable to participate in recreational activities not disabled as a matter of law); *Contreras v. Suncast Corp.* 237 F.3d 756, 764 (7th Cir. 2001) (bald assertions of reduced sexual capacity not sufficient to establish disabled status).

Watkins was able to return to the work force at least as of July 1997, less than two years after he last performed services for Roadway in October of 1995. When Roadway refused to reinstate Watkins due to his medical restrictions in July 1997, Watkins obtained a job as a computer technician. In addition, after the district court's judgment, Roadway reinstated Watkins and, after passing a return to work physical, he continues to this day to work for Roadway as a driver/dock worker.

At most, Watkins was able to show that he had a temporary, nonchronic impairment that was largely, if not completely, corrected by surgery. A surgery related absence and short term working restrictions thereafter do not constitute a disability under the ADA. *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 758-59 (5th Cir. 1996); *Heintzelman v. Runyon*, 120 F.3d 143, 145 (8th Cir. 1997); *McDonald v. Pennsylvania Dept. of Public Welfare*, 62 F.3d 92, 95-97 (3d Cir. 1995).

Watkins' assertion that the Social Security Administration found him "permanently" disabled is a distortion of the

record. Watkins has been working since October of 1997 and testified that, as of July 1997, he was able to perform all of the functions on Roadway's dock. Moreover, the determination of disabled status for social security purposes is not the same as under the ADA. *Cleveland v. Policy Mgt. Systems Corp.*, 526 U.S. 795, 119 S. Ct. 1597 (1999). Indeed, applying for disability benefits with the Social Security Administration generally serves to bar a claim under the ADA. *See, e.g., Marinelli v. City of Erie, Pennsylvania*, 216 F.3d 354, 366 n.8 (3d Cir. 2000); *Feldman v. American Memorial Life Insurance Co.*, 196 F.3d 783, 791 (7th Cir. 1999).

II.

THE CASE LAW CITED BY WATKINS IS INAPPOSITE

PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 2001 WL 567717 (2001), is irrelevant to this case. *Martin* was decided under the public accommodations provisions of Title III of the ADA; this is a Title I employment action. Moreover, and more significantly, the Court in *Martin* did not address Martin's disabled status, as that issue was apparently conceded by the PGA. Accordingly, the Court, unlike the Fifth Circuit in this case, made no finding as to Martin qualifying for protection under the ADA.

Watkins also cites cases where plaintiffs with conditions superficially similar to his were found to be disabled and reasons that the Fifth Circuit's ruling conflicts with these cases. No conflict is raised, however, as the plaintiffs in the cases cited by Watkins were able to do what Watkins could not — produce evidence to establish a limitation of one or

more major life activities. *See, e.g., McAlindin v. County of San Diego,* 192 F.3d 1226, 1234-35 (9th Cir. 1999) (plaintiff able to point to substantial evidence of an inability to engage in sexual relations, an inability to sleep and an inability to interact with others); *Frix v. Florida Tile Industries, Inc.*, 970 F. Supp. 1027, 1034 (N.D. Ga. 1997) (plaintiff able to show that he was substantially limited in the major life activity of working — although in reaching such holding, the court expressly rejected precedent from the Fourth, Fifth and Eighth Circuits); *Devine v. City of Dallas*, 2000 WL 21326 (N.D. Tex. 2000) (plaintiff unable to do housework, lift, bend, twist, care for his children, go up and down stairs more than once, or get any type of sustained sleep). Thus, there is no conflict between the Fifth Circuit's decision and the cases cited by Watkins.

III.

WATKINS' LEGAL END OR FACTUAL MISSTATEMENTS

Watkins argues throughout his Petition that he was "regarded as" disabled by Roadway and that he had a "record of" disability. These are separate protected classes of covered individuals under the ADA. At trial, the district court properly refused to submit evidence or instructions as to whether Watkins was "regarded as" disabled or had a "record of" disability as these theories of coverage had not been pled and because there was no evidence that Watkins qualified for protection under these theories. Significantly, Watkins did not appeal this ruling and did not raise the issue in his briefs to the Fifth Circuit. The *only* issue submitted to the jury and decided by the Fifth Circuit was whether Watkins was disabled under the ADA. Accordingly, *Ross v. Campbell*

Soup Co., 237 F.3d 701 (6th Cir. 2001), cited by Watkins, has no application as the court in that case reviewed the record to determine whether or not the plaintiff was regarded as disabled.

In addition, contrary to Watkins' assertions, there was no evidence at trial of any light duty openings or the existence of clerical work. While the parties did discuss *after* the entry of judgment the possibility of providing Watkins with clerical work as a means of accommodating him, there was no evidence of the availability of such work and no issue presented to the jury. In any event, the availability of light duty work is entirely irrelevant to the issue of whether Watkins is disabled.

Similarly irrelevant are Watkins' allegations regarding Roadway's supposed "100% healed" policy and Roadway managers' lack of experience in accommodating employees. In addition to distorting the record, these matters are irrelevant to the issue — Watkins' disabled status — decided by the Fifth Circuit. Because Watkins is not disabled, the Fifth Circuit quite properly never reached the issue of Roadway's alleged failure to accommodate him.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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